



World Bank Administrative Tribunal

2022

Decision No. 670

**Andrew Sutherland Fitchie,
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**Andrew Sutherland Fitchie,
Applicant**

v.

**International Bank for Reconstruction and Development,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Mahnoush H. Arsanjani (President), Marielle Cohen-Branche (Vice-President), Janice Bellace (Vice-President), Andrew Burgess, Seward Cooper, Lynne Charbonneau, and Ann Power-Forde.
2. The Application was received on 4 August 2021. The Applicant represented himself. The Bank was represented by David Sullivan, Deputy General Counsel (Institutional Affairs), Legal Vice Presidency.
3. The Applicant challenges the decision of the Pension Benefits Administration Committee (PBAC) to deny his request to modify the quantum of his Optional Survivor Annuity Pension (OSP) election.

FACTUAL BACKGROUND

4. The Applicant joined the Bank in 1994 as a Senior Counsel in the Legal Vice Presidency Unit and began participating in the Gross Plan of the Staff Retirement Plan (the Plan) at that time. The Applicant left the Bank in 2001 and, in 2004, commenced his early retirement pension. At the time he left the Bank and when he commenced his retirement pension, the Applicant was married.
5. In 2015 the Applicant and his ex-spouse began divorce proceedings under English law. Over the course of the divorce proceedings, the Applicant was in communication with the Pension Administration (PENAD) regarding his Plan benefits and the final divorce settlement. These communications concerned provisions of the Plan in respect of two specific issues: (i) spousal support payments, and (ii) an optional provision for the payment of an annuity to a surviving

spouse or ex-spouse on the death of a member of the Plan. The Applicant and his ex-spouse each received the Gross Plan Spousal Support Explanation to help them in preparing the Spousal Support Order which would be included in the final divorce settlement, as the Plan “has several unique and specific requirements on account of the institution’s privileges and immunities, inuring to the benefit of the Plan.” The Gross Plan Spousal Support Explanation also included information regarding the OSP, providing that

[a] retired participant receiving a pension may elect to provide a pension for life in a specified amount to a spouse who was not married to him on the last day of participation, to a former spouse, or to both. The election must be made within 180 days after a final divorce decree is either entered or becomes effective. The election shall become effective as of a date specified in the election that is no earlier than 60 days following the date on which the election is submitted to the Benefits Administrator. The pension shall become effective on the day after the death of the retired participant, and shall be payable to the person for whom such pension was elected and who survives the retired participant. When the election becomes effective, the pension payable to the retired participant shall be reduced. Such election may not be revoked after it becomes effective.

6. On 10 February 2016, the Applicant emailed a draft of an English Court Order to PENAD. PENAD responded to the Applicant on 8 March 2016, noting that the language regarding a Spousal Support Order was acceptable to the Plan. With respect to the language regarding the OSP, PENAD wrote:

In addition, although you may leave paragraph 4(f) [relating to the OSP] in, the Plan will not follow and/or give effect to portions of any order requiring a Plan Participant to elect an optional survivor annuity as this is self-executing. If the Participant fails to comply with such provisions in a spousal support order, the former spouse may seek enforcement through the court(s) of competent jurisdiction. The Plan and the World Bank, however, will follow any optional survivor annuity election submitted by the Participant in the event of the Participant’s death. [Emphasis in original.]

7. The Applicant replied on 30 March 2016, writing, “I note your observation as to the way in which the survivorship election functions (i.e. through my election, not under court sanction) and we will follow this guidance.” A Plan participant makes an OSP election through Form 2369.

8. The Applicant, advised by his legal and financial advisors, continued to speak with PENAD regarding his final divorce settlement over the following two years. On 19 April 2017, the Applicant spoke with a PENAD team member by phone. The Applicant followed up the phone call by email the following day, writing:

Thank you very much for taking my call yesterday and for explaining the implications of the survivorship benefit election (the 180 days rule, the one year postt [*sic*] election effective date and the mechanics of the monthly deductions to pay for the benefit. Also for reminding me about what is stated in Form 2369 – regarding the continuation of the payments, were my wife to predecease me.

9. In May 2017 the Applicant and his financial advisors exchanged further emails with PENAD regarding the OSP, clarifying how the OSP was calculated.

10. On 19 September 2017, the Applicant sent to PENAD another version of a draft Court Order, noting that it was to be submitted to the English High Court soon. The Applicant wrote:

You will see that the World Bank Pension spousal support provision is contained in simple terms at **paragraph 24 of the draft Order**. It is defined as 51.18% of the monthly US\$ amount payable to me as the plan participant, with the currency election request to the World Bank to remit the relevant amount converted into Euros.

[...]

Please may I ask you and your legal colleague to review the provision and provide formal confirmation that the World Bank will be content to operate the spousal support in favour of my ex-spouse as is envisaged in the draft English Court Order. [Emphasis in original.]

11. In an exchange of emails with the Applicant on 23 October 2017, PENAD explained that its legal counsel found the language in paragraph 24 acceptable. PENAD also stated that certain provisions relating to the duration of spousal support as well as limitations on the order with respect to the Bank needed to be included in the final order. In particular, PENAD wrote, “In the event the [OSP] is **not** elected – the reference to when payment will end will be very important.” (Emphasis in original.) The Applicant responded, expressing his views on those provisions that PENAD considered needed to be included and stating, “[Y]ou are already aware from our several previous

discussions – in particular when you explained to me the irrevocable nature [o]f this [OSP] election and its cost to me on an actuarial basis – that I shall be applying in due course for the Survivorship option.”

12. On 16 November 2017, the Applicant emailed PENAD an updated draft Court Order. The Applicant pointed out that this draft included paragraph 29, which contained the required provisions relating to the limitations on the order with respect to the Bank. The Applicant further noted that paragraph 24, relating to spousal support, was unchanged from the previous draft. The Applicant wrote:

I would be very grateful to have written confirmation from you that [PENAD] now approves the draft Consent Order (as it relates to the World Bank) and is satisfied that the spousal support [...] can be implemented as soon as reasonably practicable once triggered by the formal issue of the English Court Consent Order, its receipt by the World Bank and requisite action by me as the Participant.

PENAD responded on 29 November 2017, writing, “This confirms that the attached draft Order is acceptable under the World Bank Staff Retirement Plan.”

13. In February 2018 the divorce proceedings and financial settlement were concluded pursuant to an English High Court Consent Order (the Consent Order). On 18 February 2018, the Applicant sent PENAD the certified copy of the final Consent Order, writing:

I attach a full copy of the Consent Order in my divorce as issued and sealed by the English High Court and received on the 15th February. You may wish to share this document – detailing pension arrangements – with your legal colleague so that you are able to verify the content relevant to the World Bank is in accord with the final version which I sent you on 16th November last year which WB [World Bank] Pension Administration and Legal were able to approve.

You will see that paragraphs 24, 25, 26 and 29 remains [*sic*] unchanged as regards the World Bank’s role in the mechanics of the spousal support payments from my pension and my election for the optional survivorship annuity.

14. Paragraphs 24 and 25 of the Consent Order set out, inter alia, the parties’ agreement in respect of spousal support payments and provide as follows:

24. The parties agree that they are to receive equality of pension income upon retirement. They agree that, after consideration of both party's state pension entitlement, this is to be achieved by way of a 100% pension sharing order of the UK Transact SIPP in favour of the [ex-spouse], with a spousal support order in relation to the World Bank Plan in favour of the [ex-spouse]. The parties have instructed [pension advisors] to calculate the quantum of the spousal support order required in relation to the World Bank Plan in order to achieve parity of income assuming each party begins drawing their pension immediately. The report is attached at Annexure C. The costs incurred in obtaining that advice, further to those already paid by parties, have been shared equally between the parties.

25. The parties agree and the [Applicant] undertakes to irrevocably instruct the administrators of the World Bank Plan to make provision by way of a spousal support order in favour of the [ex-spouse] in respect of the [Applicant's] benefits under the World Bank Plan of 51.18% of the amount of US\$ as specified in the report produced by [pension advisors], attached at Annexure C, with monthly payment thereof being effected at the [ex-spouse's] request in an equivalent amount in Euros at the 60 month average exchange rate applicable under the World Bank Plan's policies, rules and guidelines. Any annual costs of living adjustment granted and applied by the World Bank to the [Applicant's] World Bank Pension shall be applied pro-rata to the [ex-spouse's] spousal support payments in Euros (Eurozone CPI [Consumer Price Index]) and the [Applicant's] US\$ entitlement (US CPI), all as determined by the World Bank.

15. Paragraphs 26 and 27 of the Consent Order concern the Applicant's undertaking to elect an OSP in favor of his ex-spouse and provide as follows:

26. The [Applicant] agrees and undertakes that he shall forthwith irrevocably elect for there to be an optional survivorship annuity under the World Bank Plan in favour of the [ex-spouse] (*with currency choice in Euros, if possible*), in accordance with the report from [pension advisors] at Annexure C and that he may not unilaterally revoke this election without an order of the court of England and Wales pursuant to paragraph 27 below. The [Applicant] further agrees and undertakes to take all reasonable steps to ensure that the election is in place within the required timeframe of 180 days from the date of decree absolute. The [Applicant] shall provide the [ex-spouse] with documentary evidence confirming this election as soon as practicable and as she may request in writing from time to time.

Upon her request, the [Applicant] agrees that he shall provide to the [ex-spouse] information available under the World Bank Plan concerning the sums to which he is entitled as a participant of the said plan.

27. The parties agree that the [Applicant] shall have liberty to apply for an order varying the quantum of the World Bank Plan spousal support and optional survivorship annuity order referred to at paragraphs 24, 25 and 26 above in the

event of a material change to the [ex-spouse's] financial circumstances. For the avoidance of doubt, the parties agree that either party shall have liberty to make an application under section 31 of the Matrimonial Causes Act of 1973. [Emphasis in original.]

16. Paragraph 29 of the Consent Order contains the express limitations on the Consent Order with respect to the Bank and provides as follows:

- a. Nothing herein may be construed as a waiver of the privileges and immunities enjoyed by the World Bank and/or its staff retirement plan;
- b. Further, this order does not require the plan to provide any type or form of benefit or option not otherwise provided under the plan;
- c. Nor shall this order be deemed to create any rights, benefits or obligations with respect to the World Bank Plan not provided for in the plan;
- d. Nothing in this order shall impose a fiduciary obligation on the plan to the former spouse, nor be construed as a designation of the former spouse as a beneficiary of any death plan, death benefit of the plan, nor shall the plan make payments to any assigns, mortgagee or pledges of either party; and
- e. Nothing in this order shall be deemed to direct or effect any transfer of assets from the plan to the former spouse, nor shall this order be deemed to divide any property rights of the parties in respect of the plan.

17. On 6 March 2018, the Applicant emailed PENAD a certified copy of the Consent Order as well as a certified copy of the Decree Absolute, dated 23 February 2018, which dissolved his marriage. The Applicant also noted that he attached "Form 2369 duly completed, with a copy of [my ex-spouse's] birth certificate as required. [I] understand that this election will come into effect on the 23rd February 2019, one year from the date of Decree Absolute." The attached Form 2369 was signed by the Applicant, electing an OSP of \$1,396.67 per month in favor of his ex-spouse. The signed Form 2369 provided:

I understand that this election may not be revoked after it has become effective and that the amount of this pension shall be payable under the Plan during the life of and to my divorced spouse, beginning the day following the date of my death provided the said divorced spouse survives me.

18. On 17 April 2019, PENAD emailed the Applicant and his ex-spouse notifying them that the OSP election had become effective, writing:

This confirms that the following reductions to the monthly payments retroactive to February 18, 2019 will apply in accordance with [the Applicant's] election of pension for former spouse of 1396.67 USD for [the ex-spouse].

Please note that this election may not be revoked. The amount of the pension shall be payable under the Plan during the life of [the ex-spouse], beginning the day following the date of death of [the Applicant] so long as [the ex-spouse] survives him.

Accordingly, the OSP premiums were deducted from the Applicant's pension each month once the election became effective.

19. The Applicant claims that, in October 2020, his ex-spouse informed him that she no longer wished to receive spousal support payments due to the receipt of an inheritance. On 26 October 2020, the ex-spouse emailed PENAD, writing, "I would like to stop the spousal support order I receive monthly from [the Applicant] with immediate effect. Please let me know how to go about this."

20. PENAD responded the same day, writing:

Once the payments pursuant to a court order commence, they will not be stopped or reduced unless the Participant demonstrates to the Bank's satisfaction that the underlying obligation to pay the spousal support has terminated or has been reduced.

The ex-spouse replied, asking how she was meant to demonstrate that she withdrew the obligation to pay the spousal support. PENAD responded, explaining that the Applicant "may submit an amended order indicating that he may now stop making payments." PENAD continued:

Please note that he also made an irrevocable election for a survivor annuity (pursuant to the order for spousal support under the World Bank Staff Retirement Plan). This means that payment will be made to you following his death. You will therefore have to inform us always of your current contact information in the event the Bank Plan approves to stop making payments to you.

21. On 16 November 2020, the Applicant contacted PENAD to propose using a Statutory Declaration which would confirm the “consensual request” to release the Applicant from his spousal support obligations. The Applicant wrote, “I formally request the World Bank to restore the World Bank pension payments in full to me as pension holder, with the exception that the monthly cost of the survivorship annuity would continue to be deducted.” PENAD responded on 19 November 2020, informing the Applicant that a court order would be required to stop the spousal support payments under the Plan.

22. On 25 January 2021, the Applicant’s attorneys emailed PENAD a draft Court Order which would be submitted to the English Courts seeking cessation of the spousal support payments and a complete revocation of the OSP. The draft Court Order provided:

The [ex-spouse] further agrees that she does not require the optional survivorship annuity as set out in paragraph 26 of the Consent Order and duly arranged by the Applicant and agrees that the Applicant be released forthwith from his undertaking to instruct the administrators of the World Bank Pension Plan to act upon his election one year following Decree Absolute, thereby allowing the Applicant to formally revoke his election and the World Bank Pension Plan administrators to terminate the survivorship annuity.

23. On 22 February 2021, PENAD emailed the Applicant, noting that, while the Applicant could proceed with a court order to amend the monthly spousal support payments, the OSP election was irrevocable. The Applicant responded the next day, requesting that PENAD use its discretion to grant his request and modify the OSP quantum to a *de minimis* value, which in his view would not violate the terms of the Plan. On 25 February 2021, PENAD responded to the Applicant’s request, citing Form 2369 and writing, “As indicated, this election may not be revoked after it has become effective.”

24. The Applicant emailed PENAD again on 5 and 18 March 2021, requesting that PENAD consider his proposal to modify the OSP election. The Applicant noted in his email of 18 March 2021 that he was informed in a phone call with PENAD on 11 March 2021 that the OSP election could not be modified. The Applicant also noted his objection to PENAD’s determination.

25. PENAD responded on 18 March 2021, reiterating that the OSP election became irrevocable once it became effective and noting that this information was contained in Form 2369 as well as the Gross Plan Spousal Support Explanation, both of which the Applicant had received. PENAD also noted that paragraph 29 of the Consent Order provided that it “does not require the plan to provide any type or form of benefit or option not otherwise provided under the plan” and that there was no provision in the Plan which allowed for the revocation or modification of the OSP once it became effective.

26. The Applicant responded on 19 March 2021, reiterating that he sought to modify the OSP election, rather than revoke it. The Applicant also expressed that he would appeal PENAD’s decision to deny his request with the PBAC.

27. On 22 March 2021, the Applicant submitted his claim to the PBAC, requesting that the OSP be adjusted to a *de minimis* value. On 23 April 2021, the PBAC met and unanimously agreed that, pursuant to the terms of the Plan, both the amount of the OSP elected and the monthly reduction in pension are permanent and cannot be modified after becoming effective.

28. The decision was communicated to the Applicant on 3 June 2021. In the email communicating the decision, the Benefits Administrator wrote:

The PBAC took note of the information and reasoning set forth in your submission dated March 22, 2021. It also reviewed the record and related documents, including (i) provisions of the Staff Retirement Plan (Plan) document, (ii) communications between you and Pension Administration between 2016 and 2021, (iii) the Form 2369 – Election of Pension for Former Spouse, that you submitted in 2019 and (iv) the English Court Order. The PBAC found that the Plan document expressly provides that OSP elections are irrevocable after becoming effective, and it further observed that the irrevocability of OSP elections was referenced in multiple documents and communications, including the election form you signed and submitted.

The PBAC recognized that both the amount of the OSP elected and the monthly reduction in pension are permanent and cannot be modified after becoming effective. This is consistent with how Pension Administration has interpreted the irrevocability of OSP elections and applied it to all Plan participants, retirees, and beneficiaries. The PBAC reasoned that granting your request would be without precedent and would violate the terms of the Plan. It further found that establishing

a precedent of permitting modifications to irrevocable OSP elections could result in serious financial and legal risks or consequences to the Plan.

Therefore, the PBAC members unanimously agreed to deny your request. As a result, the OSP election with respect to [your ex-spouse] will remain in effect, without modification. The decision of the PBAC is conclusive and binding on all persons concerned, subject to the appeal of the decision to the World Bank Administrative Tribunal within 120 days of receiving this communication.

29. On the same day, 3 June 2021, the Applicant emailed PENAD a certified copy of a Consent Order of the English High Court, dated 29 April 2021, which released the Applicant from the spousal support obligation and granted the Applicant liberty to instruct the Bank to make a downward adjustment to the OSP. On 30 June 2021, PENAD emailed the Applicant to confirm that it had received the order to terminate the spousal support and had submitted it to Plan Counsel to be accepted under the Plan. PENAD confirmed that the spousal support payments would be terminated effective 1 July 2021.

The present Application

30. The Applicant filed the present Application with the Tribunal on 4 August 2021. The Applicant challenges the decision of the PBAC to deny his request to modify the quantum of the OSP election.

31. The Applicant requests the following relief: (i) rescission of the PBAC decision; (ii) rescission of the OSP election “by reason of negligent misrepresentation”; (iii) judgment for the Applicant that there was no “consensual and enforceable accord” formed with the OSP election; (iv) termination of the OSP election for fundamental breach; (v) judgment for specific performance of the Applicant’s request to modify the OSP election; (vi) reimbursement of one month’s spousal support “wrongfully paid” to the ex-spouse on 28 June 2021; (vii) reimbursement of OSP monthly premiums collected from February 2019 to the date of the Tribunal’s judgment; and (viii) interest on the OSP monthly premiums “wrongfully collected” from 1 March 2021 to the date of the Tribunal’s judgment.

32. The Applicant requests legal fees and costs in the amount of \$19,454.91 for the preparation of his pleadings before the Tribunal. The Applicant additionally requests £18,000.50 for legal advisory costs he incurred in support of his effort “to secure the [Bank’s] commitment to provide the [OSP] under the terms of the February 2018 High Court Order [...] and the April 29th 2021 High Court [O]rder.” With respect to the second figure, the Applicant requests, in the alternative, £9,400.00 in the event the Tribunal awards relief solely under item (v).

33. On 13 September 2021, the Applicant requested provisional relief, requesting that the Tribunal order the Bank to suspend the collection of his monthly OSP premiums for the duration of the proceedings. On 5 October 2021, the Applicant submitted an amendment to his request for provisional relief, requesting reimbursement for the OSP premiums which had been collected since he submitted his initial request for provisional relief. On 20 October 2021, the Bank submitted its comments opposing the Applicant’s request. On 14 December 2021, the Tribunal denied the Applicant’s request for provisional relief, finding that he failed to show that the continued collection of OSP premiums was highly likely to result in grave hardship.

34. On 15 March 2022, the Tribunal invited the Applicant’s ex-spouse to intervene in the case pursuant to Rule 23, finding that she may have an interest in intervening in the case. On the same day, the ex-spouse responded, stating that she supported the Application and that she did not wish to intervene.

SUMMARY OF THE CONTENTIONS OF THE PARTIES

The Applicant’s Contentions

The PBAC decision should be rescinded, the OSP election should be rescinded, and, alternatively, the Bank is legally bound to modify the OSP election per the terms of the Consent Order

35. The Applicant contends that the PBAC decision is “procedurally, factually and legally unsound.” To the Applicant, the decision

demonstrates no analysis beyond a bland assertion about irrevocability. Its conclusion that the [Bank] should do nothing is not justifiable after appropriate and due consideration of: the contemporary documented evidence and factual matrix, the [Bank]’s own conduct and after impartial application of Plan rules and well-established legal principles governing pension trustee and administrators’ functions in the management of contracts of adhesion.

36. The Applicant asserts that it was the Bank’s “contractual and fiduciary duty to ensure that any terms that it was agreeing with the Applicant regarding a long-term election were fully reconciled with and operable under its policies and its Plan.” In the Applicant’s view, the Bank “simply failed to carry out this due diligence before it approved the February 2018 English Court Order, received the Applicant’s election and acquiesced to [the Consent Order] itself, with [the] Applicant’s suggestion for further legal review.” The Applicant contends that the PBAC decision ignored the fact that, in his view, the Bank gave its “unreserved agreement” to paragraph 27 of the Consent Order permitting the modification of the OSP election.

37. The Applicant disagrees with the assertion that permitting an adjustment to his OSP election “could result in serious financial and legal risks or consequences” to the Plan. The Applicant notes that the Plan already permits some adjustments to OSP amounts in the form of annual cost-of-living adjustments and contends that his request should be given the same treatment. The Applicant further contends that there is

no indication from the PBAC that the [OSP] quantum adjustment the Applicant requires would cause prejudice to any other Plan participant or, indeed, why the quantum adjustment as part of the Applicant’s private divorce settlement would be a matter that requires general reporting to other unaffected Plan members. [Emphasis in original.]

38. The Applicant also “strongly rejects” the Bank’s assertion that it is unable to modify the OSP election based on the irrevocability provisions in Form 2369 and the Plan. The Applicant contends that the Bank’s

reliance on irrevocability fails entirely because (i) the Accord for the (OSP election) contained the language of [the] Applicant’s specific right to adjust quantum without time limitation (ii) [PENAD’s] April 17th 2019 e-mail [...] about effectiveness made no mention of an end to the Applicant’s right to adjust using paragraph 27 of [the Consent Order] and (iii) as mentioned, the [Bank] manages cost-of-living

adjustment for every Plan optional survivorship annuity's quantum each year continuing for the life of the annuity. Therefore, the [Bank]'s own actual interpretation and practice *vis-a-vis* "irrevocability" permits and encompasses pre-agreed changes in quantum long after the Form 2369 effectiveness dates.

39. The Applicant further contends that the PBAC decision lacked due process. To the Applicant, the role of the PBAC was to "examine the Applicant's challenge with proper inquiry into the facts and legal principles, and reach a decision with lucid reasoning and transparent, substantiated arguments. The PBAC Decision demonstrates none of these disciplines." The Applicant avers that, "on the face of the PBAC Decision, it is not possible to conclude that the PBAC process has been fair, thorough and transparent and was founded on appropriate inquiry."

40. The Applicant next contends that the OSP election should be rescinded because of the Bank's negligent misrepresentation, the Applicant's mistaken belief that the Bank would implement paragraph 27 of the Consent Order, and the Bank's fundamental breach of contract and its duties under the Plan.

41. To the Applicant, the Bank "unreservedly committed to administering an adjustment to the (OSP) quantum, if triggered by a court ordered variation secured by the [Applicant]. The [Applicant] relied directly upon this commitment by the [Bank] when making his election." The Applicant submits that, "had the [Bank] not already agreed to the inclusion of [his] express right to adjust in November and December 2017 by discussing and approving it," he never would have made the OSP election. The Applicant further submits that, because of his mistaken belief, "[n]o agreement for the provision by the [Bank] of the [OSP] on the terms presented, sought and bargained for by the Applicant was ever formed." To the Applicant, the "Accord for the [OSP election] should therefore be struck out as being void *ab initio* and be rescinded by Tribunal order." The Applicant also contends that the Bank's "refusal to administer and operate the adjustment of the [OSP] quantum pursuant to paragraph 27 of the [Consent Order] is a fundamental breach of contract and of its duties under the Plan." The Applicant submits that this fundamental breach entitles him to terminate the OSP election.

42. The Applicant finally contends, in the alternative, that the Bank is “legally bound by its express approvals and acquiescence” to paragraph 27 of the Consent Order permitting the modification of the OSP election. To the Applicant, PENAD’s approval of the Consent Order “represent[s] the [Bank]’s repetition of a simple, clear and irrefutable commitment regarding its acceptance of and promise to implement [paragraph 27] comprising the Applicant’s right to require [OSP] quantum adjustment.” The Applicant submits that he “was and is entitled to rely upon the [Bank]’s commitment to administer an adjustment to the quantum of the [OSP].”

The Bank’s Response

The PBAC correctly applied the terms of the Plan, and the Applicant was aware that the OSP election was irrevocable

43. The Bank contends that the PBAC “acted in accordance with the terms of the Plan in declining [the] Applicant’s request to modify his irrevocable election.” The Bank stresses that OSP elections are irrevocable and cannot be modified. The Bank submits that the language of Section 11.3(a)(i) of the Plan “is clear, concise, and unambiguous: ‘[...] An election under this Subsection may not be revoked after it becomes effective.’ In simple terms, once the election of an OSP has become effective, it becomes irrevocable.” The Bank further submits several definitions of the meaning of “irrevocable” from various dictionaries, including Black’s Law Dictionary (“unalterable; committed beyond recall”), the Cambridge Dictionary (“impossible to change”), and the Merriam-Webster Online Dictionary (“not possible to revoke: UNALTERABLE” (emphasis in original)).

44. The Bank avers that permitting modifications of OSP premiums would result in the destabilization of the Plan. The Bank sets out the considerations that underpin OSP calculations, explaining that

[e]xercising the option entails a cost and the retiree’s pension is permanently reduced by a certain monthly amount to reflect the cost of securing the optional annuity, much like a premium for an insurance policy that will become payable if and when the retiree is survived by the beneficiary. The cost is determined in accordance with a formula that accounts for the amount of the OSP elected, as well as the ages of the retiree making the election and the designated beneficiary of the

OSP because this is critical to the actuarial assumptions underpinning the expected amount of premiums collected, i.e., assets for the Plan, and the expected amount of OSP benefits paid upon the death of the retiree, i.e., liabilities for the Plan.

45. The Bank further explains that

[a]llowing changes after the effectiveness of an OSP election would introduce fluctuations and unknowns into the evaluation of Plan liability, rendering the assessment less reliable and difficult to ascertain. In addition, allowing OSP elections to be revoked may expose the Plan to opportunistic and adverse elections by retirees upon changes in their personal circumstances resulting in a disproportionate loss to the Plan. In other words, if the Plan allowed staff members to make retroactive changes if/when their personal situations change, the Plan would most often lose, as there is an information inequity between the Plan and participants.

46. The Bank next submits that PENAD and the PBAC are “bound to observe all terms of the Plan, not national court orders.” The Bank avers that PENAD and the PBAC “rightfully applied the explicit terms of the Plan and not the Order” when they denied the Applicant’s request to modify his OSP election. To the Bank, PENAD and the PBAC

observed the plain language of the Plan prohibiting OSP revocations after the effective date of the election, and applied this language when presented with a record that clearly demonstrated that [the] Applicant (i) was on ample notice of the OSP irrevocability and (ii) furnished an Order that specified that it (a) could not require the Plan to provide anything not otherwise permissible under the Plan and (b) had no jurisdiction over the Plan.

47. The Bank further contends that the Applicant “understood that the OSP was irrevocable, and his feigned ignorance does not relieve him from his obligation to know the applicable rules.” The Bank notes that the Applicant expressly acknowledged the irrevocable nature of the OSP election in his communications with PENAD. Further, the Bank submits that, to the extent that the Applicant was unaware of the irrevocable nature of the OSP election, staff members have the responsibility to keep themselves apprised of their rights and that ignorance of the law is no excuse.

48. The Bank next contends that, contrary to the Applicant’s assertions, the PBAC does not have the discretion to grant the Applicant a modification to his OSP election. The Bank explains that the PBAC members “are fiduciaries of the Plan and its participants and beneficiaries, meaning

they act in the interest of the Plan and carry out their duties prudently in compliance with the Plan document.” The Bank submits, therefore, that the PBAC

does not have unfettered discretion to disregard the terms of the Plan to accommodate the demands of a participant. Any such action would violate their fiduciary duties by failing to adhere to the Plan’s terms and jeopardizing the Plan’s qualification status.

To the Bank, the PBAC “acted reasonably, responsibly and in the interests of the Plan in upholding the Plan’s express and consistent prohibition on retroactive elections, as set forth in Section 11.3.”

49. Finally, the Bank contends that the Applicant has been accorded due process. The Bank submits that the “Benefits Administrator and the PBAC acted in accordance with the PBAC’s Rules, treated [the] Applicant fairly and provided due process.” The Bank notes that the PBAC Rules “do not specify a standard for the decision to take other than to state that the decision must be in writing and state the reasons on which it was based.” The Bank submits that the PBAC decision satisfies these requirements and that the PBAC “treated [the] Applicant fairly, reviewed all relevant material, and provided [the] Applicant with a reasoned, written decision, thereby satisfying all due process obligations.”

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

WHETHER THE PBAC’S DECISION WAS REASONABLE

Scope of the Tribunal’s review

50. With respect to challenges to PBAC decisions, the Tribunal has recognized such decisions “cannot be regarded purely as a matter of executive discretion.” *Courtney (No. 2)*, Decision No. 153 [1996], para. 30. Accordingly, the Tribunal may examine

(i) the existence of the facts; (ii) whether the conditions required by the [Plan] for granting the benefits requested were met or not; (iii) whether the PBAC in taking the decision appealed has correctly interpreted the applicable law; and (iv) whether the requirements of due process have been observed.

Id. See also FT, Decision No. 645 [2021], para. 61; *Mills*, Decision No. 383 [2008], para. 31.

51. With regard to the applicable law in PBAC decisions, in *Aleem and Aleem*, Decision No. 424 [2009], para. 57, the Tribunal stated, “The dispute must be resolved under the [Plan] applying the rules and policies contained therein.” Section 11.3(a)(i) under Article 11 of the Plan provides:

A retired participant receiving a pension may elect to provide a pension for life in a specified amount (subject to paragraph (ii) below) to a spouse who was not married to the retired participant on the last day of participation, to a former spouse, or to both. The election shall be made within 180 days of the date of marriage in the case of a new spouse, or in the case of a former spouse, within 180 days after a final divorce decree is either entered or becomes effective. In the case of a new spouse, the election shall become effective one year after the date of the marriage to such spouse. In the case of a former spouse, the election shall become effective one year after the divorce becomes effective, or, if later, 60 days after the election is received by the Benefits Administrator. When the election becomes effective, the pension payable to the retired participant shall be reduced in accordance with Article 27, Schedule C, Table 1. If the retired participant dies on or after the effective date of the election and is survived by the person for whom the pension was elected, a pension shall be payable to such person effective on the day after the death of the retired participant. An election under this Subsection may not be revoked after it becomes effective.

Existence of the facts

52. The relevant facts in this case are not in dispute. The Applicant and his ex-spouse concluded their divorce agreement in February 2018 pursuant to a Consent Order of the English High Court. The Consent Order provided that the Applicant would elect an OSP in favor of his ex-spouse. It further provided that the Applicant would have “liberty to apply for an order varying the quantum of the World Bank Plan spousal support and optional survivorship annuity order [...] in the event of a material change to the [ex-spouse’s] financial circumstances.” On 6 March 2018, the Applicant submitted a signed Form 2369 to PENAD electing an OSP in favor of his ex-spouse, and the OSP became effective in February 2019, one year after the divorce.

53. In October 2020, the ex-spouse notified PENAD that she no longer wished to receive spousal support payments. In November 2020, the Applicant formally requested “the World Bank to restore the World Bank pension payments in full to me as pension holder, with the exception

that the monthly cost of the survivorship annuity would continue to be deducted.” PENAD then informed the Applicant that a court order would be required before the spousal support payments could cease.

54. On 25 January 2021, the Applicant emailed PENAD a draft Court Order which, in addition to terminating the Spousal Support Order, purported to allow the Applicant to revoke his OSP election. PENAD informed the Applicant that the OSP election could not be revoked. The Applicant, thereafter, requested that the OSP be adjusted to a *de minimus* value. PENAD reiterated that the OSP election could not be revoked, and the Applicant challenged this decision before the PBAC.

Application of the facts to the requirements of the Plan and whether the PBAC was correct in its interpretation

55. It is in relation to these established facts that the requirements of the Plan, their interpretation, and their application will now be examined.

56. The Tribunal notes that the Applicant submitted the signed Form 2369 electing an OSP in favor of his ex-spouse within 180 days of the conclusion of his divorce, satisfying the requirements of Section 11.3(a)(i) of the Plan. The Tribunal further notes that the OSP election became effective one year later and that the Applicant was notified of this on 17 April 2019. The Tribunal observes that once it became effective the OSP election could no longer be revoked, having entered into force in accordance with the terms of Section 11.3(a)(i) of the Plan.

57. The Applicant contends that, despite the language of Section 11.3(a)(i), his OSP election could be modified even after it became effective because PENAD had given its “unreserved agreement” to paragraph 27 of the Consent Order permitting the modification of the OSP election. The Tribunal considers that the Applicant’s assertion relies on a fundamental misunderstanding of PENAD’s role with respect to its review of the draft Court Order.

58. The Tribunal notes the Bank’s explanation that PENAD

reviewed [the] Applicant's draft court order for spousal support for the limited purpose of determining whether it was consistent with the Plan's requirements and limitations. While Pension Administration does not give personal legal advice, it will instruct participants and beneficiaries as to what is acceptable under the Plan and explain areas that will not be given automatic effect. Therefore, Pension Administration reviewed the draft for compliance and acceptability for Plan purposes.

59. The Tribunal considers that, contrary to the Applicant's assertions, PENAD was not involved in the process of "approving" any of the draft Court Orders which the Applicant chose to submit. Rather, the record demonstrates that, upon the Applicant's request, PENAD reviewed the relevant provisions of drafts for the purpose of informing the Applicant whether or not they were acceptable under the terms of the Plan. Thus, in its email of 8 March 2016, PENAD expressly informed the Applicant that the Plan would not follow or give effect to provisions of any order which obliged a participant to make an election of an optional survivor annuity, explaining that such optional annuities were self-executing. PENAD further explained that, if a participant failed to comply with the provisions in an order relating to spousal support, then enforcement of such provisions could be sought through the courts of competent jurisdiction.

60. Moreover, there is nothing in the record to indicate that the Applicant ever sought PENAD's review of paragraph 27 in particular. Even in the Applicant's email transmitting the final Consent Order to PENAD, the Applicant referred only to paragraphs 24, 25, 26, and 29 as relevant to the Bank's role in connection with spousal support payments and his election of the optional survivorship annuity. In any event, the Tribunal considers that PENAD's limited role in reviewing draft Court Orders for the purpose of expressing a view on their compatibility or otherwise with the Plan cannot and does not constitute a binding agreement that the Bank will take any particular course of action nor does it establish an accord upon which the Applicant could rely.

61. The Tribunal will next consider whether any rights were conferred upon the Applicant pursuant to paragraph 27 of the Consent Order. The Tribunal recalls that paragraph 27 provides that the Applicant shall have the "liberty to apply for an order varying the quantum of the World Bank Plan spousal support and optional survivorship annuity order [...] in the event of a material change to the [ex-spouse's] financial circumstances." The Tribunal finds that the only right

conferred upon the Applicant under that provision was the right to apply, not to the Bank, but to the court that granted the Consent Order. Essentially, paragraph 27 provides that, in the event of a material change in the financial circumstances of his ex-spouse, the Applicant had liberty to apply to the court for a variation in the amount payable to her in respect of spousal support and survivorship annuity. How such a variation in the quantum receivable by his ex-spouse was to be achieved was a matter for the parties to work out and for the court to order, whether on consent or otherwise. The “liberty to apply” for a variation in the terms of the Consent Order did not confer on the Applicant any right to obtain an order changing his OSP election.

62. The Tribunal considers that having the “liberty to apply” to a national court for a new order does not create any obligation on the Bank to accept the terms of the new order under the Plan. Rather, PENAD, and ultimately the PBAC, will consider the new order and will determine whether its provisions may be enforced under and/or are compatible with the terms of the Plan. In this instance, the Applicant exercised his “liberty to apply” to the English High Court and received a new Consent Order which, under the law of his own jurisdiction, released him from his spousal support obligation and allowed him to request a downward adjustment of his OSP election to a *de minimis* amount. However, those courts exercise no jurisdiction over the Bank. The Consent Order, at paragraph 29(b), had expressly recognized that the order did not require the Plan to provide any option not otherwise provided thereunder. Further, the new Consent Order recognized that “the English Courts do not have jurisdiction in relation to the enforcement of the provisions within this order which relate to the World Bank Pension Plan” and provided that “the parties expressly affirm that nothing in their agreement intends or requires the provision of any type or form of benefit or option or the creation of any rights or obligations not provided under the World Bank plan.” Thus, PENAD made its own determination as to whether the new Consent Order was acceptable under the Plan. Whereas the cessation of spousal support payments was acceptable, the revocation of the OSP was not. As PENAD had already informed the Applicant that an OSP election, once effective, could not be revoked or modified under the terms of the Plan, it was only the termination of spousal support payments that was accepted.

63. The Applicant also contends that, despite the wording of Section 11.3(a)(i) of the Plan providing that OSP elections could not be revoked once effective, modifications to the OSP

election would be permissible under the Plan. The Tribunal does not agree. It accepts the Bank's submissions with respect to the plain meaning of the word "irrevocable" – namely, that it refers to that which is "unalterable; committed beyond recall," "impossible to change," and "not possible to revoke: UNALTERABLE" (emphasis in original). The Tribunal finds that there is no ambiguity in Section 11.3(a)(i) and concludes that the PBAC was entirely reasonable in its finding that the Plan prohibited any modification of the OSP election once it became effective. The Tribunal considers that this finding also accords with the nature of the OSP offered under the Plan, in that a retired staff member is given a time-limited option to elect to provide for an annuity to a new spouse or former spouse within a fixed period of the marriage or divorce, respectively, that will result in the disbursement of a fixed stream of payments in the future to that spouse if the retiree predeceases the spouse. The Tribunal takes note that an annuity like the OSP is a contract and, once an election is made and has become effective, it must be carried out in accordance with its terms.

64. The Applicant also objects to the PBAC's reasoning that permitting an adjustment to his OSP election "could result in serious financial and legal risks or consequences" to the Plan. He submits that the Plan already permits some adjustments to OSP amounts in the form of annual cost-of-living adjustments and contends that his request should be given the same treatment. The Applicant also cites *Agerschou*, Decision No. 114 [1992] to support his contention that irrevocable elections may be rescinded at the Bank's discretion. The Bank, conversely, contends that permitting modifications to OSP premiums would result in the destabilization of the Plan, since OSP premiums are carefully calculated to manage the liabilities for the Plan. The Bank explains that "[a]llowing changes after the effectiveness of an OSP election would introduce fluctuations and unknowns into the evaluation of Plan liability, rendering the assessment less reliable and difficult to ascertain."

65. The Tribunal recognizes the importance of stability to the Plan. It is a plan for thousands of participants and retirees, which needs to be protected from uncertain financial liability and risk. The Tribunal accepts that "allowing OSP elections to be revoked may expose the Plan to opportunistic and adverse elections by retirees upon changes in their personal circumstances resulting in a disproportionate loss to the Plan." The Tribunal takes into account the Bank's

observation that, if members could make changes, retroactively, if and when their personal situations change, the Plan would most often lose out as there would always be an information inequity between the Plan and the participants. The Bank notes that the Plan's assets and liabilities are assessed on an annual basis so as to ensure that the Plan is adequately funded. The Tribunal accepts that, if contractual contributions to the Plan were permitted to fluctuate unpredictably because of a change of mind on the part of retirees who have made OSP elections, it would make actuarial assessments based on assets almost impossible to calculate as their value in any given year could not be ascertained with any degree of reliability.

66. Moreover, the Tribunal considers that the risks associated with OSP elections are borne by both sides, the participant and the Plan, when such elections are made and that the cost is formulated to account for such risk. For instance, participants accept a risk when making an OSP election, as they are committing to making a permanent contribution from their pension for a benefit that may never be paid out because it is possible that the beneficiary may predecease the participant. Once OSP elections are made, the Plan manages its assets and associated financial instruments accordingly, as it is committed to paying an agreed amount in an annuity benefit for the rest of a beneficiary's life even though there is always a risk that the participant may die shortly after an OSP election becomes effective with very few monthly premiums having been deducted from the pension. The Tribunal considers that the risk decision crystallizes upon the effective date of the election, when OSP calculations are made. Allowing elections to be revoked after becoming effective would disrupt future and already costed liabilities, making the management of the Plan and its assets untenable. The Tribunal is, therefore, satisfied that permitting adjustments to an OSP election of the type requested by the Applicant could result in serious financial and legal risks or consequences to the Plan.

67. Additionally, the Tribunal is not persuaded by the Applicant's contention as to cost-of-living adjustments that are permitted under the Plan. The Tribunal considers that such annual adjustments are an element in the design of the OSP and thus accounted for at the time that the election becomes effective. Modifications such as the one requested by the Applicant, however, were not accounted for when the Plan accepted liability for the OSP election. The Tribunal finds

the Applicant's comparison between his requested modification and the annual cost-of-living adjustments to be without merit.

68. The Tribunal likewise finds without merit the Applicant's comparison of this case to the facts of *Agerschou* [1992]. The applicant in that case had misunderstood the procedure for commutation elections and the effective date of his pension, inadvertently delaying the start date of his pension. Recognizing the applicant's genuine mistake, the Bank offered to accept a withdrawal of the applicant's commutation election and to process the applicant's pension from an earlier start date. The applicant rejected this offer, however, and the Bank decided that the later start date would then remain in place. It was this decision that the applicant challenged before the Tribunal, and the Tribunal dismissed the application on jurisdictional grounds. *Agerschou* [1992], para. 43.

69. To the Applicant, the Bank's offer to the applicant in *Agerschou* [1992] proves that the Bank has the discretion to allow participants to revoke elections which have become irrevocable under the Plan. For several reasons, the Tribunal is not persuaded. First, *Agerschou* [1992] and the present case involve entirely distinct factual records. The Plan provision at issue in *Agerschou* [1992] concerned an election whereby the participant could commute a part of his pension into a lump sum payment, whereas the Plan provision in the present case is concerned with an election of an optional annuity. Further, the applicant in *Agerschou* [1992] realized his mistake within a month of making his election, whereas the Applicant here requested that his OSP election be revoked almost two years after it became effective. While the Bank determined that it could grant an exception to the applicant in *Agerschou* [1992], the consequences of granting an exception in that instance cannot be assumed to be the same as granting an exception to the present Applicant.

70. Next, while the Bank did offer an exception to the applicant in *Agerschou* [1992], the applicant declined the offer. The Tribunal thus did not have an opportunity to consider whether such an exception was permissible under the Plan. The Tribunal also notes that the Bank's offer in *Agerschou* [1992] was because the applicant genuinely misunderstood the relevant Plan provisions. In this case, however, the Tribunal is satisfied that the Applicant was fully aware of the irrevocability of the OSP election, and he confirmed, in writing, his clear understanding of the

irrevocable nature of an OSP election on more than one occasion. He acknowledged, for example, in an email of 20 April 2017, that the implications of the election had been explained to him; and he confirmed his awareness that payments would continue even if his ex-spouse were to predecease him. A similar acknowledgement that the irrevocable nature of an OSP election had been explained to him is to be found in his email to PENAD of 23 October 2017. The Tribunal thus considers that the Applicant's reliance on *Agerschou* [1992] is misplaced, and it does not accept that *Agerschou* is authority for the proposition that the Bank has the discretion to permit the revocation of an OSP election. Accordingly, the Tribunal finds that the PBAC was reasonable in its assertion that permitting the modification of OSP premiums would result in the destabilization of the Plan.

71. The Tribunal will also consider the Applicant's contention that the OSP election should be rescinded due to the Bank's alleged negligent misrepresentation and fundamental breach of contract and its duties. In this regard, the Tribunal observes the Applicant's statement that, "had the [Bank] not already agreed to the inclusion of [his] express right to adjust in November and December 2017 by discussing and approving it," he never would have made the OSP election.

72. The Tribunal first considers that, as established above, PENAD's review of the draft Court Order did not establish an accord. That being so, it is satisfied that there was no contract subsisting which the Bank could then fundamentally breach. The Tribunal thus finds the contention in respect of "fundamental breach" to be untenable.

73. The Tribunal next considers whether PENAD's review of the draft Court Order amounted to negligent misrepresentation. The Applicant submits that the Bank "unreservedly committed to administering an adjustment" to the OSP election. The Tribunal finds that this assertion is not supported by the record. In fact, the draft Court Order reviewed by PENAD expressly recorded the Bank's reservations, providing that it "does not require the plan to provide any type or form of benefit or option not otherwise provided under the plan" and that it shall not "be deemed to create any rights, benefits or obligations with respect to the World Bank Plan not provided for in the plan."

74. Further, as noted above, the record demonstrates that the Applicant was fully aware of the irrevocability of the OSP election. In his 23 October 2017 email to PENAD discussing the latest draft Court Order, which at that point included paragraph 27, the Applicant wrote, “[Y]ou are already aware from our several previous discussions – in particular when you explained to me the irrevocable nature [o]f this [OSP] election and its cost to me on an actuarial basis – that I shall be applying in due course for the Survivorship option.” Moreover the Tribunal considers that there is no ambiguity whatsoever in the language of Form 2369, which the Applicant signed with the following acknowledgment:

I understand that this election may not be revoked after it has become effective and that the amount of this pension shall be payable under the Plan during the life of and to my divorced spouse, beginning the day following the date of my death provided the said divorced spouse survives me.

In light of the above, the Tribunal finds the Applicant’s contention of negligent misrepresentation to be wholly without merit.

75. The Tribunal will now consider the Applicant’s contention that PENAD’s approval of the Consent Order “represent[s] the [Bank]’s repetition of a simple, clear and irrefutable commitment regarding its acceptance of and promise to implement [paragraph 27] comprising the Applicant’s right to require [OSP] quantum adjustment.” The Tribunal disagrees. It finds that the record does not contain evidence of an “unequivocally proved promise, a clear and irrefutable commitment or assurance” that the Bank would implement paragraph 27. *Moss*, Decision No. 328 [2004], para. 45. The Tribunal recalls that PENAD’s limited role in reviewing the draft Court Order did not bind the Bank to any particular course of action and is satisfied that the record does not indicate that PENAD’s review engaged in any way with paragraph 27 and the Applicant’s liberty to apply to the English High Court for a variation in the quantum payable to his ex-spouse. The Tribunal thus finds that PENAD’s statements that the provisions on spousal support in the draft Court Order were acceptable under the Plan cannot constitute evidence of a promise to implement paragraph 27.

76. In light of the above, the Tribunal finds that there are no grounds to rescind the OSP election. The Tribunal concludes that the PBAC properly interpreted the requirements of the Plan when it denied the Applicant's request to modify the OSP election.

Due process

77. The Tribunal will next consider whether due process has been observed, asking whether "the procedures utilized by the PBAC in reaching its conclusions were, in the judgment of the Tribunal, fair and thorough." *Shekib*, Decision No. 358 [2007], para. 46.

78. The Rules of Procedure of the PBAC provide:

Each Decision shall be in writing, stating the reasons on which it is based and any action that the Committee may require or recommend. The Decision shall also refer to the Requestor's appeal rights under the Statute of the World Bank Administrative Tribunal, and Subsection 19.2(g) of the Plan. Decisions will normally be issued within six months following the submission of the Request.

79. The Applicant asserts that the PBAC decision failed to "examine the Applicant's challenge with proper inquiry into the facts and legal principles, and reach a decision with lucid reasoning and transparent, substantiated arguments." The Tribunal disagrees. The Tribunal finds that the PBAC, in considering the Applicant's request, reviewed the materials submitted by the Applicant and properly concluded that the OSP election was irrevocable, noting that the irrevocability of the OSP election was referred to multiple times in the documents submitted by the Applicant. The Tribunal notes that the PBAC decision was communicated to the Applicant in writing within six weeks. The Tribunal observes that the PBAC decision was brief but finds that it conveyed clearly and sufficiently the reasons behind the decision, respecting the procedural rules of the PBAC. Accordingly, the Tribunal considers that the PBAC process was fair and thorough, and finds that the requirements of due process were observed.

OTHER MATTERS

80. The Tribunal notes the Applicant's claim for reimbursement of one month's spousal support which he contends was wrongfully paid to his ex-spouse on 28 June 2021. The Tribunal observes that the Applicant has not brought this claim before the PBAC and therefore finds that it is not properly before the Tribunal.

DECISION

The Application is dismissed.

/S/ Mahnoush H. Arsanjani

Mahnoush H. Arsanjani

President

/S/ Zakir Hafez

Zakir Hafez

Executive Secretary

At Washington, D.C., * 3 June 2022

* In view of the public health emergency occasioned by the COVID-19 pandemic and in the interest of the prompt and efficient administration of justice, the Tribunal conducted its deliberations in these proceedings remotely, by way of audio-video conferencing coordinated by the Office of the Executive Secretary.